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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JERSEY SHORE STATE BANK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE AMICUS CURIAE
AMERICAN BANKERS ASSOCIATION
IN SUPPORT OF THE PETITIONER

JOHN J. GILL III
General Counsel
Counsel of Record

MICHAEL F. CROTTY
Associate General Counsel-
Litigation

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5028

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QUESTION PRESENTED FOR REVIEW

Whether a bank, which is alleged to be liable for the unpaid employee income withholding taxes and Federal Insurance Contribution Act taxes of its customer, is entitled to receive a notice of tax assessment where the Internal Revenue Code requires that such notice be provided to "each person liable for the unpaid tax."

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INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States, representing member banks in each of the fifty states and the District of Columbia. One of the core functions of the banking industry is to lend funds to businesses for the conduct of their operations, including the payment of wages to employees. In consequence of this, commercial banks are the class most obviously and directly affected by Section 3505(b) of the Internal Revenue

Code. Enacted as a part of the Federal Tax Lien Act of 1966, this section makes lenders, sureties and other persons liable for certain unpaid taxes of employers to whom the lenders and others have advanced funds for the purpose of paying wages of employees. Liability is not automatic. The United States must show that the lender advanced funds "with actual notice or knowledge...that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax."

As we shall demonstrate in the sections of this brief which follow, the decision of the Third Circuit,¹ if allowed to stand, would have the effect of allowing the United States to file suits against banks, and maintain them, some nine years after the failure of the third party to pay taxes, without any prior notice to the banks. Under some circumstances, even this outrageously long period of time could be extended, almost indefinitely. Such a lengthy delay between the nonpayment of taxes by a third party and the filing of suit by the United States seriously impedes the

¹ The Court has granted a Writ of Certiorari in this case, no doubt in order to resolve a conflict within the circuits. The Third Circuit in the case below, *United States v. Jersey Shore State Bank*, 781 F.2d 974 (3d Cir. 1986) and the Ninth Circuit in *United States v. Hunter Engineers & Constructors, Inc.*, 789 F.2d 1436 (9th Cir. 1986) both concluded that the United States need not give notice to a third party lender of assessments against their borrowers for unpaid withholding taxes, and that failure to supply such notice does not bar an action by the United States against the third party lender. The Seventh Circuit, in *United States v. Associates Commercial Corporation*, 721 F.2d 1094 (7th Cir. 1983) and the Eleventh Circuit, in *United States v. Merchants National Bank of Mobile*, 772 F.2d 1522 (11th Cir. 1985), petition for cert. filed, No. 85-1480 (U.S., filed March 6, 1986), have reached a contrary conclusion.

ability of banks to defend themselves against stale claims.

The disposition of this case will affect a great many of our members. The Internal Revenue Service says that in 1984 some six million quarterly withholding tax returns were accompanied by no payment or only by partial payment of the taxes due. While the IRS attempts to collect the taxes by other means first, in about one case of every five thousand, efforts are eventually made to collect the unpaid taxes from third party lenders under Section 3505. (See United States Petition for a Writ of Certiorari at 11-12, *United States of America v. Merchants National Bank of Mobile*, No. 85-1480 (U.S. filed March 6, 1986). Even one case per five thousand would yield a total of 1,200 such efforts for 1984.

Accordingly, the American Bankers Association, with the consent of the parties, respectfully submits this brief as amicus curiae in order to represent the interests of its members who are not parties to the litigation.

SUMMARY OF THE ARGUMENT

The plain meaning of the applicable sections of the Internal Revenue Code dictate in two respects that banks, in this and comparable cases, are entitled to receive a notice of assessment of taxes for which they are liable if an assessment is made. First of all, the words of Section 6303 of the Code say so in no uncertain terms; secondly, there is simply no way in which the statute of limitations for tax collection actions can be given meaning and effect in the absence of a notice of assessment to a third party who is liable for the unpaid taxes of another. Without the

statute of limitations, the ability of such a third party taxpayer to defend itself against a tax collection suit would be seriously prejudiced. There are no realistic countervailing policy considerations which would dictate a different result, even if such policy considerations could enter into a determination of the legal issues raised by this case.

ARGUMENT

I. The Plain Meaning Of Section 6303 Requires The Government To Give Notice To Lenders Of Any Assessment Of Taxes For Which The Lender Is Liable

At bottom, this is a very simple case. Section 6303 of the Internal Revenue Code of 1954 provides, quite explicitly, that the Secretary of the Treasury *shall* "within 60 days, after the making of an assessment of a tax pursuant to Section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof."

Is the bank in this case a "person liable for the unpaid tax" of its borrower, Pennmount, or is it not? If the bank is not a "person liable for the unpaid tax," then the United States has no cause of action against the bank under Section 3505 of the Code. If the bank is a "person liable for the unpaid tax," then it is entitled to the notice required by Section 6303, and the failure of the United States to have provided it precludes a tax collection suit by the United States against the bank filed more than three years after the return was filed.

The statute refers to "*each* person liable for the tax" rather than *the* person liable for the tax. This obviously contemplates that more than one person could, under the proper circumstances, be found liable

for the same taxes—primarily or secondarily. However many "persons" may ultimately be found liable for the taxes, *all* are entitled to notice. This Court has held that when the word "each" is used to modify a noun (in that case, the word "employee") "(a) broader or more comprehensive coverage. . . would be difficult to frame." It "leaves no doubt as to the Congressional intention to include *all* employees within the scope of the Act unless specifically excluded." The term has an "unrestricted sweep." *United States v. Rosenwasser*, 323 U.S. 360, 362-363 (1945).

Once the plain meaning of the statute has been ascertained, it must simply be applied as written and the judicial process has come to an end. *TVA v. Hill*, 437 U.S. 153, 194-95 (1978). See also *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 106 S. Ct. 681, 689 n. 7 (1986).

II. The Third Circuit Opinion In The Case Below Deprives Banks Of The Benefit Of The Statute of Limitations To The Prejudice Of The Banks

Section 6501 of the Internal Revenue Code is the general statute of limitations provision for tax collection cases. It provides in relevant part that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed. . . and no proceeding in court without assessment for the collection of tax shall be begun after the expiration of such period." I.R.C. § 6501(a)(1982).

Any statute of limitations is enacted by Congress in order to protect potential defendants against stale claims. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938). Such statutes are enacted for good and valid public policy reasons, including the probable

unavailability of witnesses and records and faded recollections after the passage of time. Quite obviously, in the case of tax collections, Congress concluded that it would be fundamentally unfair to expect a party to defend itself against claims more than three years old. Despite that, the Third Circuit in the case below has authorized the government to file and maintain a suit against a bank for unpaid taxes that are not even the bank's own taxes, but rather the taxes of a third party borrower, and to file and maintain that suit for taxes that have remained unpaid for well over three years. As indicated above, the government may make an assessment of the taxes as much as three years after the filing of a return. If it does so, the "tax may be collected. . . by a proceeding in court, but only if the . . . proceeding [is] begun (1) within 6 years after the assessment of the tax." I.R.C. § 6502(a)(1) (1982). Consequently, the "statute of limitations" can effectively extend for a period of nine years. In addition to that, the six year statute of limitations on tax collections after the assessment is made is "suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter."² I.R.C. § 6503(b) (1982). This suspension of the statute of limitations can add indefi-

² This section usually applies to bankruptcy proceedings. See, e.g., *McCauley v. United States*, 525 F.2d 1108 (9th Cir. 1975); *United States v. Verlinsky*, 459 F.2d 1085 (5th Cir. 1972). In this, and predictably in most cases where the government asserts lender liability under Section 3505, the employer will be bankrupt. If the employer is not bankrupt, the government would seek, and probably be able to recover, unpaid taxes directly from the employer.

nitely to the nine-year period within which suit can be brought by the government for unpaid taxes.

It is difficult to square a general Congressional determination that tax cases become "stale" after three years with the virtually open-ended liability of a taxpayer resulting from application of Sections 6502(a)(1) and 6503(b) unless there is some device which serves the same function of providing notice to the defendant that the filing of a lawsuit would. Congress has provided just such a device. In Section 6303(a), the Internal Revenue Code provides that the government shall "within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." Any "person" who destroys or loses necessary records or allows recollections to fade or to go unrecorded after receiving such a notice would only have himself, herself or itself to blame for any inability to defend against a suit brought by the government for the unpaid taxes six or ten years later. There is no question that the party really liable for the unpaid taxes in a case such as this is entitled to the statutory notice that it will, at some future time, be required to defend itself in a suit for unpaid taxes. But the Third Circuit in the case below has held that a party with only derivative liability for the tax is entitled to lesser consideration. That decision would deprive the statute of limitations and the policy considerations behind it of any meaning and effect with respect to this class of persons liable for taxes. And yet, statutes cannot be construed in such a fashion as to render parts of them inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Aside from the fact that Congress did not distinguish among parties entitled to the notice of assessment (providing that *each* person liable for the tax was so entitled), the considerations leading to the adoption of the statute of limitations in the first place are applicable to lenders liable for the unpaid taxes of employers under Section 3505.³

Like any other business, banks do not like to keep records any longer than necessary. The reason for this reluctance is obvious:

[E]ach new record takes up that much more space. After a while, the bulk becomes cumbersome and then outright unmanageable. What was once routine evolves into a desperate search for a place to store the mounting avalanche. Every added file clerk, every new file cabinet, each additional foot of dead storage space emphasizes the growing waste of space, time, energy and money to meet the demands for the retention of records.

Prentice-Hall, Inc., *Your Business Records: A Simplified Guide to What Records You Must Keep and How Long You Must Keep Them*, (1980) at 3.

Consequently, banks are inclined to destroy records once the period they are required by the government

³ The question has been raised in this and related cases whether a notice of assessment is a prerequisite to suit. Under the facts of this case, however, that question need not be answered. Even if the government may file suit without first providing a notice of assessment, it cannot take advantage of an extended statute of limitations unless it does so. The bank here should be entitled to summary judgment because the government has failed to file suit within the statute of limitations, and that statute of limitations was not extended in accordance with Section 6502(a)(1).

to keep those records expires. In fact, it is the national policy, under the Paperwork Reduction Act of 1980, "to minimize the Federal paperwork burden for individuals, small businesses, State and local governments and other persons." 44 U.S.C. § 3501(1) (1982). Among other things, the burden Congress sought to relieve by enactment of the Paperwork Reduction Act includes record keeping requirements imposed by the government. 44 U.S.C. § 3502(4). There are requirements imposed by the Secretary of the Treasury upon financial institutions to keep certain records which "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 C.F.R. § 103.31 (July 1, 1985 Edition) (emphasis supplied). Among those records the Secretary requires financial institutions to keep is "a record of each extension of credit in an amount in excess of \$5,000. . . which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof." 31 C.F.R. § 103.33(a) (July 1, 1985 Edition).

The Secretary requires that these particular records "shall be retained for a period of 5 years." 31 C.F.R. 103.37(c) (July 1, 1985 Edition). In fact, the Internal Revenue Service has established a record retention period of four years for virtually all employment tax records. *See Guide to Record Retention Requirements*, Office of the Federal Register (1981) reproduced in relevant part as an Appendix to this brief. If the banks are obligated to keep such records for a period of four or five years, then, *ipso facto*, it must be entirely permissible to destroy those records after four or five years. Predictably, banks *rely* upon the Sec-

retary of the Treasury's rules and after this period would not ordinarily keep such records. Now, under the reasoning of the court below, the Secretary of the Treasury may bring suit against banks *nine* years or more after an extension of credit, with no prior notice to the banks of an intent to do so. Having therefore induced the banks into giving up the means of defending themselves, by virtue of his records retention regulations, the Secretary then seeks to take advantage of the banks' inability to conduct a meaningful defense to a claim of liability under Section 3505. That is an intolerable construction of the statute and should not be countenanced by this Court.

The failure of the government to give notice to the third party lender of an assessment of taxes against the employer prejudices the lender in other ways as well. As Judge Weis pointed out in his dissent in the case below, the receipt of timely notice would enable the lender to "arrange for payment, compromise, or take other steps in his own best interests. Without notice of the assessment, however, the party under § 3505 may not be alerted to this continuing exposure and concomitant risk. I am not convinced the Congress intended such an anomalous result." *United States v. Jersey Shore State Bank*, 781 F.2d 974, 984 (3d Cir. 1986). During a nine year period after the nonpayment of taxes by an employer, interest and penalties accrue for the nonpayment. Timely notice would allow the lender to cut off the accrual by payment of the taxes for which it might ultimately become liable. Without timely notice, the lender might continue to advance funds to the borrower, subjecting itself not only to greater potential liability for the borrower's unpaid taxes, but also to probable losses

on the loans themselves. A bank is not likely to find itself liable for the unpaid taxes of healthy corporate borrowers. Those borrowers already pay withholding taxes themselves or can be compelled to do so by the Internal Revenue Service without recourse to the remedies available under Section 3505. A claim against a bank under Section 3505 almost necessarily presupposes a seriously troubled taxpayer/borrower. A bank with knowledge that the borrower is in dire financial straits—knowledge which could be supplied by a notice of assessment—would be able to limit its losses on potentially bad loans by calling its existing loans to the borrower or at the very least by declining to advance additional funds.

III. Compliance With Section 6303 Imposes No Undue Burden Upon The Government

In order to avoid the plain meaning of the statute as described above, and to counterbalance the interests of the lenders in receiving fair warning of their potential liabilities at a meaningful time, the government claims an administrative burden in connection with providing the statutorily required notice of assessment. Such a requirement would allegedly result in

an unworkable enforcement scheme that, in practical effect, would largely nullify what Congress intended to be an important part of the tax-collection scheme. When the Commissioner makes an assessment of unpaid payroll taxes, he ordinarily will have no way of knowing whether the delinquent employer has borrowed money from a third party under circumstances that might render the lat-

ter liable under Section 3505. There is no indication on the face of a payroll tax return who the employer's creditors might be. . . . Nor could the Commissioner reasonably be expected, at the time he makes the assessment against the employer, to undertake to identify such lenders.

United States Petition for Writ of Certiorari at 11, *United States v. Merchants National Bank of Mobile*, No. 85-1480 (U.S., filed March 6, 1986).

The administrative burden, such as it is,⁴ is largely self-inflicted, and the government has the capacity to alleviate its own burden without assistance from the courts or the Congress. For example, the government complains that the payroll tax return does not identify an employer's creditors. And yet, it is the Internal Revenue Service which designed the payroll tax return. No law forbids the Internal Revenue Service from asking for this information, and indeed the Internal Revenue Code specifically vests in the Secretary of Treasury the authority to determine what information may be required by such forms. I.R.C. § 6011(a).

The concern for what the Commissioner might reasonably be expected to know at the time of making the assessment against the employer is relevant only if the Commissioner insists upon making the assessment, almost as a matter of rote, at the time he

⁴ The Seventh Circuit described this claim as "highly speculative and unsupported by any convincing statistics" in *United States v. Associates Commercial Corp.*, 721 F.2d 1094, 1099 (7th Cir. 1983).

receives a quarterly withholding tax return unaccompanied by full payment. There is no particular reason to do so. The law allows the Commissioner three years within which to make the assessment. During that long a period of time, there is plenty of opportunity to discover the identity of the employer's lenders, if any.

Even if the Commissioner makes an initial assessment at the time of receipt of a withholding tax return, he has the capacity under Section 6204 of the Code to make a supplemental assessment against the employer, subject to the same statute of limitations as the original assessment, if the original assessment was incomplete or imperfect in any way.

Finally, there is no particular reason why, within the three year statute of limitations, the Commissioner could not make a separate assessment of the lender's liability, even if circumstances prevent the Commissioner from rendering timely notice to the lender within sixty days of assessing the employer's liability. Again, the Commissioner has the capacity, under existing law, to take three years within which to conduct essentially the perfunctory investigation necessary to direct a simple notice form to the proper party. That cannot be such an outrageous "burden" upon him that Congress could not have intended to impose it, or that Congress would have opted in favor of allowing lawsuits against lenders, without prior notice, nine years after the fact rather than impose such a burden on the Commissioner.

CONCLUSION

For all of the reasons stated herein, the American Bankers Association, on behalf of the commercial banking industry, respectfully urges the Court to reverse the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

John J. Gill III
General Counsel
Counsel of Record

Michael F. Crotty
Associate General Counsel-Litigation
Attorneys for Amicus Curiae
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5028

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APPENDIX

RECORD RETENTION GUIDE 1981

Federal Register Office GUIDE TO RECORD RETENTION REQUIREMENTS REVISION AS OF JANUARY 1, 1981

This is a Guide in digest form to the provisions of Federal laws and regulations relating to the keeping of records by the public. It tells the user (1) what records must be kept, (2) who must keep them, and (3) how long they must be kept.

The citation appearing at the end of each entry represents the title and section number of the Code of Federal Regulations. For example, 20 CFR 38.1 would refer to section 38.1 of title 20 of the Code of Federal Regulations.

The Guide is derived from the regulations published by the various agencies in the Code of Federal Regulations, as amended in the daily issues of the FEDERAL REGISTER through December 31, 1980. Authority for the regulations is derived from the laws published in the United States Code, as amended by laws enacted during 1980.

This Guide was prepared under the direction of Robert E. Lewis, assisted by Brenda A. Robeson and Wilma P. Greene. INQUIRIES, telephone 202-523-5233. SUGGESTIONS concerning this publication may be sent to John E. Byrne, Director, Office of the Federal Register, National Archives and Records Service, Washington, D.C. 20408.

Coverage

In preparing the Guide it was necessary to establish boundaries in order to keep it within its intended purpose.

The records covered by the Guide are those that address categories of activities conducted by individuals, busi-

nesses, and organizations for which retention requirements are expressly stated in the Code of Federal Regulations or certain public laws.

In many laws and regulations there is an implied responsibility to keep copies of records of reports and other papers furnished to Federal agencies and to keep related working papers. Such implied requirements have not been included in the Guide.

The following types of requirements also have been excluded from the Guide:

(1) Requirements involving the furnishing of reports to Government agencies, the filing of tax returns, or the submission of supporting evidence with applications or claims.

(2) Requirements directing the keeping of papers furnished by the Government, such as passports, licenses, permits, etc., unless they are closely related to other records which must be kept.

(3) Requirements involving the display of posters, notices, or other signs in places of business.

(4) Requirements contained in individual Government contracts, unless the contract provisions are incorporated in the Code of Federal Regulations.

Arrangement

The digests of recordkeeping provisions comprising the Guide are grouped under the departments or independent agencies which impose or administer them (see "Contents"). Individual items are numbered to simplify indexing. The names, addresses, and telephone numbers of contact persons within each agency are located at the end of the appropriate grouping.

In general, the entries retain their original numbers from year to year. Renumbering occurs only after a major re-

vision of the material and is so indicated in brackets after the name of the agency involved. Individual items revised, amended, deleted, or added are shown in brackets following the item heading.

Two supplements to the Guide contain generalized information about certain requirements under the Second War Powers Act of 1942 and detailed information on requirements imposed by the Federal Aviation Administration relative to the availability of credentials for inspection.

An index to the Guide follows the last supplement.

EMPLOYMENT TAX

Retention period: Regulations requiring the retention of employment tax records usually specify the number of years that such records must be retained. For some employment tax records, however, no specific retention period can be established and the "materiality rule" discussed in section 4.1 under *Income Tax* must be applied. Under the materiality rule, those records must be retained so long as they may become material in the computation of any tax.

Specific record retention requirements have not been assigned to the following and the materiality rule applies:

4.100 Vow-of-poverty religious orders electing social security coverage for its members. [Amended]

To maintain records of the details relating to the retirement of each of its members. 26 CFR 31.3121(a-1)(b)(4)

A specific record retention period has been established for the following employment tax records:

4.101 Employers required to deduct and withhold income tax on wages which include sick pay. [Amended]

To keep records with respect to payments (sick pay) made directly to employees under a wage continuation plan, and other information specified in the sections cited.

Retention period: 4 years after the due date of such tax for the return period to which the records relate or the date such tax is paid, whichever is later. 26 CFR 31.3401(a)-1(b)(8)(ii)(b) and (c), 31.6001-1, 31.6001-5

4.102 General record retention requirement for employment taxes.

(a) Persons required by regulations or instructions shall keep copies of any return, schedule, statement, or other document as part of their records.

(b) Any person who claims a refund, credit, or abatement shall keep records as indicated in the section cited.

(c) While not mandatory (except in the case of claims) it is advisable for each employee to keep permanent accurate records as indicated in the section cited.

Retention period: 4 years after the due date of such tax for the return period to which the records relate or the date such tax is paid, whichever is later. In the case of claimants, at least 4 years after the date the claim is filed. 26 CFR 31.6001-1

4.103 Employers liable for tax under the Federal Insurance Contributions Act. [Amended]

To keep records of all remuneration, whether in cash or in a medium other than cash, paid to his employees after 1954 for services (other than agricultural labor which constitutes or is deemed to constitute employment, domestic service in a private home of the employer, or service not in the course of the employer's trade or business) performed for him after 1936; and records of all remuneration

eration in the form of tips received by employees after 1965 and reported to him. Records shall include information specified in section cited.

Retention period: 4 years after the due date of such tax for the return period to which the records relate, or the date such tax is paid, whichever is later. 26 CFR 31.6001-1, 31.6001-2

4.104 Employers and employee representatives subject to the Railroad Retirement Tax Act. [Amended]

To keep records of all remuneration (whether in money or in something which may be used in lieu of money) other than tips, paid to his employees after 1954 for services rendered to him (including "time lost") after 1954 and such other records as specified in section cited.

Retention period: 4 years after the due date of such tax for the return period to which the records relate, or the date such tax is paid, whichever is later. 26 CFR 31.6001-1, 31.6001-3

4.105 Employers and persons who are not employers for purposes of the Federal Unemployment Tax Act. [Amended]

To maintain records as specified in the section cited to determine the correct liability or nonliability for the tax.

Retention period: 4 years after the due date of such tax for the return period to which the records relate or the date such tax is paid, whichever is later. 26 CFR 31.6001-1, 31.6001-4

4.106 Employers required to deduct and withhold income tax on wages paid. [Amended]

(a) To keep records of all remuneration paid to such employees and tips received by employees and reported to the employer. All employer is required to keep only charge receipts in connection with charged tips. (26 U.S.C. 6001 as amended by Pub. L. 95-600) Such records shall show

with respect to such employee, the information specified in the section cited.

(b) To retain the Internal Revenue Service copy and the employee copy of all undeliverable annual withholding statements.

Retention period: 4 years after the due date of such tax for the return period to which the records and statements relate, or the date such tax is paid, whichever is later. 26 CFR 31.6001-1, 31.6001-5, 31.6051-1(f)(3)

4.107 Employers claiming a refund, credit, or abatement of tax under the Federal Insurance Contributions Act or Railroad Retirement Tax Act.

Every employer who has filed a claim for refund, credit, or abatement of employer tax under section 3101 or section 3201 of the Code, or a corresponding provision of prior law, collected from an employee shall retain as part of his records, the written receipt of the employer showing the date and amount of the repayment, or the written consent of the employee, whichever is used in support of the claim. Where employee tax was collected under section 3101 of the Code, or a corresponding provision of prior law, from an employee in a calendar year prior to the year in which the credit or refund is claimed, the employer shall also retain as part of his records a written statement from the employee (a) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected and (b) that the employee will not claim refund or credit of such amount.

Retention period: 4 years after the date the claim is filed. 26 CFR 31.6001-1, 31.6402(a)-2(a)(2), 31.6404(a)-1

4.108 Repayment by employer of tax erroneously collected from employee under the Federal Insurance Contributions Act or the Railroad Retirement Act and of income tax withheld from wages.

(a) *Before employer files return.* To obtain and keep as part of the records the written receipt of the employee showing the date and amount of the repayment.

(b) *After employer files return.* If the amount of an overcollection is repaid to an employee, the employer shall obtain and keep as part of the records the written receipt of the employee, showing the date and amount of the repayment. If in any calendar year, an employer repays or reimburses an employee in the amount of an overcollection of employee tax under section 3101 of the Code, or a corresponding provision of prior law which was collected from the employee in a prior calendar year, the employer shall obtain from the employee and keep as part of the records a written statement (a) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (b) that the employee will not claim refund or credit of such amount.

Retention period: 4 years after the due date of such tax for the return period to which the records relate, or the date such tax is paid, whichever is the later. The records of claimants shall be maintained for a period of at least 4 years after the date the claim is filed. 26 CFR 31.6001-1, 31.6413(a)-1